

1                                   **IN THE SUPREME COURT OF THE STATE OF ALASKA**

2  
3 J.P. and S.P. (former Foster Parents),  
4                                   Appellant

5 vs.

6 State of Alaska/Parents/Sun'aq Tribe  
7 of Kodiak  
8                                   Appellees.

Supreme Court No. S-18107

Trial Court Case: 3AN-17-0032 CN

Sun'aq Tribal Court Case: CN-21-002

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10                                   **TRIBAL REPLY MEMORANDUM**

11                   COMES NOW, the Sun'aq Tribe of Kodiak, by and through Counsel, and  
12 provides this Legal Reply Memorandum in response to the Court's July 9, 2021  
13 invitation for memoranda regarding the former Foster Parents' legal party status to  
14 appeal, and application of the mootness doctrine to this case.

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16                   **I. Legal History**

17                   This case involves a Tribal Youth presenting with Alutiiq ancestry, and eligibility  
18 to be enrolled as a citizen in both the Sun'aq Tribe of Kodiak, and the Tangirnaq  
19 Native Village. 86 FED. REG. 7554, 7558 (2021). The Youth's biological father is a  
20 Tribal Citizen of Tangirnaq Native Village [Enrollment# FUL2018-05]. Indian  
21 Child Welfare Act (ICWA), 25 U.S.C. § 1903(4) (Indian Child).

22                   The Tribal Youth's case regrettably languished in the State of Alaska's child  
23 protection system for years; lacking in compliance with ICWA. 25 U.S.C. §§  
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1 1912(d), 1915(b). Distressed by this problematic case history, both Tribes  
2 conferenced and unified for purposes of ensuring adherence to the substance and  
3 policy of the Indian Child Welfare Act. The Alutiiq Tribes reached an inter-  
4 governmental agreement, and Tangirnaq Native Village designated the Sun’aq Tribe  
5 of Kodiak as the Youth’s primary Tribe for ICWA purposes. 25 C.F.R. §  
6 23.109(c)(1) (When a youth presents as eligible for membership in more than one  
7 tribe, “[i]f the Tribes are able to reach an agreement, the agreed-upon Tribe should  
8 be designated as the Indian child’s Tribe”).  
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11 The Sun’aq Tribe of Kodiak Intervened as a Legal Party on March 12, 2021. 25  
12 U.S.C. § 1911(c). On April 19, 2021 the Sun’aq Tribe of Kodiak petitioned the  
13 Anchorage Superior Court to transfer jurisdiction over the child protection  
14 proceedings to the Sun’aq Tribal Court. 25 U.S.C. § 1911(b). By Order of May 26,  
15 2021, the Anchorage Superior Court granted the Tribe’s Petition to Transfer  
16 Jurisdiction:  
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18 Consistent with ICWA, the tribe should play a strong role in the  
19 effort to achieve permanency. With the transfer to tribal court,  
20 permanency is likely to occur sooner. *ITMO, J.F.*, 3AN-17-00032 CN  
(May 26, 2021 – Order Transferring Jurisdiction to Tribal Court).  
21

22 On June 3, 2021, the Sun’aq Tribal Court provided its Order Accepting  
23 Jurisdiction over the ICWA case. The following week, the Sun’aq Tribal Court  
24 held a placement review hearing per its own Children’s Code and customary  
25 practices: The Tribal Court confirmed the Tribal Youth as a Ward of the Court;

1 the Court delegated placement and care authority to the Sun'aq Social Services  
2 Department; the Court agreed with, and ordered a change-of-placement to Paternal  
3 Aunt, Uncle, and Cousins living outside of Alaska. *ITMO J.F.*, CN-002 (June 9,  
4 2021) (Change of Placement). SUN'AQ CHILDREN'S CODE § 1.05 (Placement  
5 Preferences for Extended Family). The former Foster Parents did not participate in  
6 this review hearing, as they are not Parties to the Tribal Youth's protection  
7 proceedings. SUN'AQ CHILDREN'S CODE § 2.06.  
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10       Upon a request for reconsideration from the former Foster Parents'  
11 Counsel, the Tribal Court agreed under the best evidence rule to hold a re-hearing  
12 to reconsider its placement decision. The Tribal Court invited the participation and  
13 testimony of the former Foster Parents; their aligned witnesses from different  
14 branches of the family; and a child psychologist consultant familiar with the case.  
15 The Tribal Court gathered evidence and took argument from the former Foster  
16 Parents' Counsel regarding the best interests of the Tribal Youth. After careful  
17 consideration of the totality of evidence, including but not limited to: The  
18 individualized circumstances of this Youth and this Extended Family placement;  
19 the Sun'aq Children's Code; and the strong generations of policy that guide judges  
20 to place tribal children with family - The Sun'aq Tribal Court affirmed the change-  
21 of-placement order to the Paternal Aunt, Uncle, and Cousins. *ITMO J.F.*, CN-002  
22 (June 16, 2021) (Order Affirming Placement).  
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1 The Tribal Youth was transferred to the physical custody and care of their  
2 Extended Family on June 16, 2021, and has been residing safely with their kinship  
3 guardians ever since. The Tribal Youth remains a ‘Ward of the Sun’aq Tribal  
4 Court’, under the exclusive jurisdiction and protection of two Indian Tribes sworn  
5 to safeguard their children’s best interests. 25 U.S.C. § 1911(a); SUNAQ CHILDREN’S  
6 CODE Chaps. 1 and 3.<sup>1</sup>

## 8 **II. Inherent Sovereignty**

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10 Alaska Native Tribal Governments exercise inherent sovereignty over essential  
11 tribal matters, as they have since time immemorial. Foundational sovereign matters  
12 include but are not limited to: Internal Governance; Child/Family Welfare; and  
13 Enrollment/Citizenship. CASE & VOLUCK, ALASKA NATIVES AND AMERICAN  
14 LAWS 380 (3<sup>rd</sup> Ed. 2012); COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 4.01  
15 (2012 Ed.); *John v. Baker*, 982 P.2d 738, 751 citing *United States v. Wheeler*, 435 U.S.  
16 313 (1978). The former Foster Parents misapply the Canons of Federal Indian  
17 Law<sup>2</sup> with the narrowing suggestion that tribal governments somehow lack the  
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21 <sup>1</sup> It is not kind, true, or necessary to mis-characterize a Tribal Court’s decision as  
22 pre-determined, covert, flawed, or invoke the spectre of child trafficking as applied  
23 to Indian Tribes. As centuries of painful history teaches: There is no resource that  
24 is more vital to the continued existence and integrity of Indian tribes than their  
25 children. ICWA, 25 U.S.C. § 1901.

<sup>2</sup> *John v. Baker*, 982 P.3d at 752-753 (Indian law is interpreted broadly in favor of  
tribal sovereignty; doubtful expressions are resolved in favor of Tribes; any  
limitations on inherent sovereignty must be clear and express). *See also*, COHEN at §  
2.02[1].

1 inherent sovereign authority to forge inter-governmental agreements with sister  
2 tribes regarding: Child Welfare; Designation as Primary ICWA Tribe; or Tribal  
3 Court Jurisdiction/Venue/Choice of Law  
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5 These core sovereign functions are handled internally by the tribal governments;  
6 it would read Indian law backwards to suggest sovereign Tribes need to produce  
7 and file their inter-governmental agreements with the State of Alaska's trial courts  
8 for validation. *See also* 25 C.F.R. § 23.109(c)(1) (expressly recognizing the validity of  
9 inter-tribal agreements in this realm of child protection).  
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11 The Sun'aq Tribe of Kodiak was the youth's validly designated ICWA Tribe in  
12 the Anchorage Superior Court; the Tribe properly exercised a transfer of  
13 jurisdiction to its Tribal Court under ICWA, 25 U.S.C. § 1911(b); and as expressed  
14 above, the Sun'aq Tribal Court is the appointed and exclusive jurisdiction for any  
15 further proceedings impacting this Ward of the Tribal Court. 25 U.S.C. § 1911(a).  
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### 17 **III. Legal Status of Foster Parents In This Case**

18 Legal Party status in Child In Need of Aid (CINA) proceedings is a strict, and  
19 serious matter. CINA Rule 2(l). To this end, this Court recently instructed:  
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- 21 • Allowing foster parents to intervene as a matter of course would  
22 be contrary to the goals of the CINA statutes, and courts should  
23 be hesitant to allow it.
- 24 • If foster parents' only rationale for intervening is to explain their  
25 own attachment to the child and their plans for the child's future  
... their involvement will in most cases be more prejudicial than  
helpful to the process.

- Foster parent intervention should therefore be a narrowly tailored and rare exception rather than the rule.  
*State of Alaska DHHS/OCS v. Zander B.*, 474 P.3d 1153, 1163-1165 (Alaska 2020).

The *Zander B.* decision points to the Alaska Rules of Civil Procedure (ARCP) 24 as the framework for the permissive legal intervention of the Foster Parents in this CINA matter: The rule provides that the Foster Parents timely file and serve a Motion to Intervene with a supporting Petition setting forth the legal and factual basis for the intervention. ARCP 24(c). The original parties are then granted an opportunity to reply, and can inform the court regarding important evidence or law that may favor, or disfavor granting the permissive motion to intervene. This entire process is designed to properly inform the court’s decision on whether allowing the new intervenor may “unduly delay or prejudice the adjudication of the rights of the original parties.” ARCP 24(b).

This Court properly notes, this process was never followed by the former Foster Parents in this matter. The former Foster Parents never filed or served a Rule 24(b) Motion to Intervene with supporting Petition; the original Parties were never given an opportunity to respond to such Motion and supporting Petition; the Court never issued an Order granting Intervention and Legal Party status to the former Foster Parents. *JP & SP v. Alaska/Parents/Sun’aq Tribe of Kodiak*, S-18107 (July 9, 2021) at 4, fn 4. This Court rightly observes, the former Foster Parents did not (and do not) meet the definition of a party “to the trial court proceeding when

1 the final order or judgment was entered”; the former Foster Parents in this matter  
2 do not qualify as having the very authority to appeal. Alaska R. App. 204(g).

3 The former Foster Parents now seek to avoid this stark legal reality by  
4 fashioning a ‘*de facto* permissive intervention’ construct at the appellate level in a  
5 court system that no longer has the case. The former Foster Parents confuse liberal  
6 participation in various stages of CINA proceedings, an entry of appearance, or the  
7 providing of important statements under CINA Rule 17(b), with actual  
8 intervention and legal party status. As noted in the GAL’s Reply Memorandum in  
9 this matter: allowing informal ‘*de facto*’ permissive intervention of foster parents in  
10 CINA cases outside the bounds of civil procedure will further debilitate Alaska’s  
11 already overburdened child protection systems.<sup>3</sup> The former Foster Parents’ non-  
12 party efforts to circumnavigate the rules of civil procedure in order to “explain  
13 their own attachment to the child and their plans for the child’s future” is in  
14 opposite with this Court’s narrow guidance on the limited circumstances justifying  
15 contractual foster parents full intervention into the pre-existing intensity of CINA  
16 proceedings. *Zander B.* 474 P.2d at 1163-1165.

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22 <sup>3</sup> GAL Brief In Response to Appellant, *J.P. & S.P. v. Alaska/Parents/Sun’aq Tribe of*  
23 *Kodiak*, S-18107 (July 29, 2021) at 3, fn 3 (also noting that actual intervention and  
24 legal party status can mean access to volumes of confidential information in the  
25 extreme, impacting the rights to privacy of the children and parents). *See also*,  
*Zander B.*, 474 P.3d at 1178 (dissent of Justices Winfree and Carney) (liberal  
allowance for foster parent intervention and legal party status will prejudice parents’  
rights, create undue delay, and unnecessarily expand CINA litigation).

1 The State of Alaska CINA matter is now closed; the legal Parties expended  
2 considerable effort and resources to reach this resolution. Now, the former Foster  
3 are attempting to bypass: (1) inherent tribal sovereignty; (2) ICWA's federal  
4 recognition of that sovereignty; (3) the Superior Court's honoring that authority;  
5 and (4) the Alaska Rules of Civil Procedure; relying on emotion to invent a new  
6 form of intervenor/party status at the appellate level as an attempt to overturn the  
7 decision of another sovereign's court. The former Foster Parents' continuing  
8 litigation is indeed creating unfair prejudice.

11 **IV. The Former Foster Parents Do Not Present an Important Public**  
12 **Interest Exception to the Mootness Doctrine**

13 As discussed above, the Tribal Youth is a Ward of the Sun'aq Tribal Court, and  
14 is placed in a Kinship Guardianship with relatives who do not presently reside in  
15 Alaska. It is not clear what hypothetical relief the former Foster Parents are  
16 seeking. This Court has already recognized the impropriety of seeking to command  
17 the court of a wholly separate sovereign to return a child protection case. *JP & SP*  
18 *v. Alaska/Parents/Sun'aq Tribe of Kodiak*, S-18107 (July 9, 2021) at 5, fn 5.<sup>4</sup> Without  
19 the availability of remedy or tangible relief, the Foster Parents' contentions are  
20 moot. The former Foster Parents provide no profound or important public  
21 interest exception to the mootness doctrine. Instead, the Memorandum in response  
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25 <sup>4</sup> If litigants disagree with the decision of a Tribal Court, they must first exhaust  
their remedies in Tribal Court before seeking relief from other court systems, even  
on questions of jurisdiction. *Parks v. Simmonds*, 329 P. 3d 995, 1013 (Alaska 2014)



1 to this Court's invitation to address discrete legal questions betrays an effort to 're-  
2 try the facts' through unfounded and emotional assertions. The former Foster  
3 Parents' sorrow over a change-of-placement reveals that this litigation is at its core:  
4 personal and emotional. The Tribe understands the intensity of children's cases,  
5 and will otherwise not respond to the former Foster Parents' mis-characterizations  
6 (including images of conspiratorial Indian Tribes trafficking Native children to  
7 "white half-relatives" under "cover of darkness"). Foster Parents' Response to  
8 Order Dated July 9, 2021, *J.P.&S.P. v. Alaska/Parents/Sun'aq Tribe of Kodiak*, S-  
9 18107 (July 19, 2021) at 11. The Tribe trusts this Court has little time for the  
10 recycling of offensive libels regarding the perceived bias or incompetence of tribal  
11 court systems. *Parks*, 329 P.3d at 1015-16. The present litigation is fueled by  
12 specific facts tied to specific emotions, and does not present an important legal  
13 question evading review. The Tribe is not aware of a repeating concern that  
14 Alaska's Tribal Courts are misusing ICWA to traffic Native children.  
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17 Ultimately, the real public interest has already been served in this matter: A  
18 Tribal Youth's problematic CINA matter was transferred to Tribal Court, and they  
19 are safely placed with healthy Extended Family. 25 U.S.C. §§ 1911(b), 1915(b); 81  
20 FED. REG. 38822 (June 14, 2016) (Tribal Courts are best positioned to safeguard  
21 the welfare of Tribal Children). This matter is moot, and there are no compelling  
22 public interests requiring resuscitation. The Tribe suggests that continued CINA  
23 litigation by non-party former Foster Parents seeking reversal of a sound transfer  
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1 of jurisdiction provided for by federal law, while seeking to disrupt a healthy  
2 extended family placement with potential permanency, is not in the public's  
3 interest.  
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## 5 **V. Conclusions**

6 Although the Sun'aq Tribe of Kodiak received some hard words from the  
7 former Foster Parents through this extended process, the Tribe will conclude with  
8 a *Quyanaa* (Thank You) to the former Foster Parents for their service in the "vital  
9 but inherently temporary role in a child's life."<sup>5</sup> Despite this ongoing gratitude, the  
10 Tribe posits it is time to end this litigation, and count our Blessings:  
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12 ~ A Resilient and Healthy Tribal Child

13 ~ Professional, Caring, and Discerning Judges who watch carefully from the  
14 Sun'aq Tribal Bench

15 ~ Safe and Healthy Kinship Guardians with Potential for Permanency if Needed

16 Precisely the kind of outcome intended by Congress when it passed the Indian  
17 Child Welfare Act.  
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19 Respectfully submitted this 3<sup>rd</sup> day of August, 2021.  
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22 David Avraham Voluck  
23 Attorney for Sun'aq Tribe of Kodiak  
24 AK Bar# 9706043  
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<sup>5</sup> *Zander B.*, 474 P.3d at 1163 quoting *Osterkamp v. Stiles*, 235 P.3d 178, 187 (Alaska 2010).